

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SOUL'D OUT PRODUCTIONS, LLC,)
an Oregon limited liability)
company,)

Plaintiff,)

v.)

ANSCHUTZ ENTERTAINMENT GROUP,)
INC., a Colorado corporation,)
et al.,)

Defendant.)

Case No. 3:18-cv-00598-MO

August 19, 2020

Portland, Oregon

Oral Argument

(By Videoconference)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFF: Mr. Nichola F. Aldrich, Jr.
Schwabe, Williamson & Wyatt
1211 S.W. Fifth Avenue, Suite 1900
Portland, OR 97204

FOR THE DEFENDANTS: Mr. Justin W. Bernick
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Mr. Casey M. Nokes
Cable Huston LLP
1001 S.W. Fifth Avenue, Suite 2000
Portland, OR 97204

COURT REPORTER: Bonita J. Shumway, CSR, RMR, CRR
United States District Courthouse
1000 S.W. Third Ave., Room 301
Portland, OR 97204
(503) 326-8188

(P R O C E E D I N G S)

(August 19, 2020; 11:11 a.m.)

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THE COURTROOM DEPUTY: Your Honor, this is the time and place set for a video oral argument in Case No. 3:18-cv-598-MO, Soul'd Out Productions, LLC versus Anschutz Entertainment Group.

We do have a court reporter recording these proceedings, and we ask that you mute your video connection and/or microphone while others are speaking to not be so distracting with the background noise.

Counsel, can you identify yourself for the record.

MR. ALDRICH: Your Honor, this is Nika Aldrich of Schwabe, Williamson & Wyatt on behalf of plaintiff Soul'd Out Productions.

MR. NOKES: Your Honor, this is Casey Nokes at Cable Huston on behalf of defendants, acting as local counsel.

MR. BERNICK: Your Honor, this is Justin Bernick from Hogan Lovells, also on behalf of defendants.

THE COURT: Thank you all for being here. It's been an interesting morning, and some of you were able to peek into a criminal case plea. I always like it when civil attorneys listen in on criminal case pleas, because it tends to calm them down a little bit, understanding that the worst that can happen to you today is that no one is going to prison for a minimum of

1 ten years and a mandatory life sentence. So those tend to put
2 things into perspective. And then I also had the privilege of
3 watching Mr. Aldrich tie his tie this morning. So that -- I
4 was able to check out his methodology here to see how that
5 went. So, all in all, a beneficial morning for all of us.

6 I want to give you my tentative thoughts here and
7 then see where things stand by way of oral argument.

8 So we have four claims left potentially headed
9 forward, the three really what I'll call intentional
10 interference claims. They're different labels, and two are
11 from California and one is from Oregon, but elements of those
12 claims are difficult to distinguish, and I don't think it's
13 important for today's purposes that we have to make much
14 distinction among them, since the biggest issues apply equally
15 and similarly across all three claims.

16 And then the fourth claim, the California unfair
17 competition law, does have different elements and different
18 issues.

19 So we're here on a motion to dismiss, and the
20 principal theory on the intentional interference claims is the
21 lack of knowledge by defendant. And that's been referred, I
22 think, helpfully by way of a shorthand as the timing issue,
23 because previously and today, we're thinking about knowledge in
24 terms of two different times, knowledge the defendant might
25 have had relevant to the elements of these claims -- or

1 relevant to the existence of the relationship, I should say,
2 and the time of the formation of the contract, if you want to
3 think of it that way, which would be the formation or signing
4 of the radius clause.

5 And the second point in time that's part of the
6 timing issue is at the time of the enforcement of the contract.
7 And, of course, each side argues for its own time period.

8 I've discussed this previously, and I've -- with you
9 all, and I've expressed some skepticism about plaintiff's
10 theory that the relevant time period is the time period of the
11 enforcement of the radius clause not the formation of it, but
12 I've never ruled on it previously. And, candidly, I'm now no
13 longer skeptical about that argument. It makes some sense to
14 me.

15 And I do that by looking at two sources of
16 information. One is just the elements of the claims. And I
17 don't find in the elements of the claims any requirement -- if
18 you think of that as a form of statutory construction almost, I
19 don't find anywhere in those elements any requirement that if
20 the -- that if some sort of contract is the method of
21 interference, that you look to whether the relevant knowledge
22 of the existence of the relationship was present in defendant
23 at the time of the formation of the contract versus enforcement
24 of it. So it's not there.

25 And then there is some authority -- I agree that it's

1 merely persuasive and not directly on point, but there is some
2 authority for this idea in *Edwards v. Arthur Andersen*.

3 There is, conversely, no contrary authority; that is,
4 no authority supporting the idea that I need to look at the
5 formation. There's this argument that it's rational to say,
6 well, if I'm the defendant and I enter into a radius clause
7 with someone and I don't know anything about this other
8 economic relationship when I entered into the radius clause,
9 that it can't be wrong later to simply enforce the clause. But
10 I guess I'm now of the view that I'm not sure it matters much,
11 that I'm just to look at the elements and see whether in
12 interfering it was done with knowledge of the relationship.

13 So those are my tentative thoughts, and if that's
14 correct, there are a couple of other points also raised by the
15 defendant, even if the timing issue goes against them, as to
16 why these three claims should fail.

17 One is the failure to show any intentional
18 interference. And that doesn't entirely but it principally
19 rests on the argument in point number one, the timing issue;
20 that is, if the defendant is correct about the timing issue
21 being that I look only at the formation of the radius clause
22 not its enforcement, then at that time there's also a failure
23 to show intentional interference. But if plaintiff wins that
24 argument, then plaintiff has, of course, an argument that
25 there's the interference in the enforcement. So that's, I

1 think, a derivative argument of point number one.

2 And the third argument raised against these claims is
3 that there's no actual wrongfulness.

4 Give me just a moment here.

5 And so plaintiff has alleged previously four kinds of
6 wrongfulness: the antitrust problem; the violation of the Code
7 16600; the violation of the Oregon common law provision; and
8 wrongful because of fraud. Those are the four sort of
9 components of wrongfulness plaintiff has previously alleged.

10 The first one is gone by the law of the case.
11 Previously plaintiff argued that AEG had ignored the first and
12 fourth reasons. Well, the first one is gone and the fourth one
13 wasn't ignored, or at least isn't for my purposes today
14 ignored, and that is there is sort of a comprehensive Footnote
15 10 in defendant's pleading laying out its reasons why it thinks
16 there just cannot be a credible allegation of fraud here. I
17 guess that's sort of an *Iqbal/Twombly* argument about just can't
18 be so. And so I'll be curious to hear about the plaintiff's
19 position on fraud.

20 But as to the second and third, the only real
21 argument I've had so far that I'm aware of from defendant is a
22 lack of standing. And that's, of course, also no longer a
23 viable argument for defendant on law of the case. And so I
24 think those claims, if I'm right about the timing issue, those
25 claims have to go forward past the motion to dismiss stage.

1 So perhaps it would be helpful if we stopped there
2 and just waited on the UCL until we're finished with argument
3 on these intentional interference claims.

4 Since it's defendant's motion, I'll start with
5 defendant.

6 MR. BERNICK: Thank you, Your Honor. Justin Bernick
7 from Hogan Lovells on behalf of defendants. And I appreciate
8 the framing that Your Honor just provided because it helps
9 address the issues.

10 There are three elements that you have pointed out
11 that we believe Soul'd Out has not plausibly alleged, and we
12 believe that all three of those arguments are still alive and
13 well: intent and knowledge, which I agree go hand in hand, and
14 then the wrongful conduct element.

15 What I would say is that there's a common thread
16 behind all of these, and that's enforcement. That's the word
17 that Your Honor used with respect to enforcement. Your Honor,
18 every case that Soul'd Out has cited, every case we've seen
19 where there has been a claim permitted by a third party, as in
20 this instance, has involved some active enforcement above and
21 beyond merely declining to waive a contract provision. To be
22 clear, that's all that's been alleged here is the decision not
23 to waive the contract provision at issue.

24 In the *Edwards v. Arthur Andersen* case Your Honor
25 mentioned, the key distinction here -- and I believe we briefed

1 this issue -- is that the Court found that the wrongful conduct
2 at issue was insisting on the employee entering into a new
3 agreement after the subsequent employer was in the picture.
4 And that's the termination of noncompete agreement. And the
5 Court was explicit about this in the case. The Court said,
6 "The termination of the noncompete could be considered a
7 wrongful act for purposes of this claim for interference with
8 prospective economic advantage."

9 And so I think a lot hinges on that word that you
10 used, "enforcement," Your Honor. Merely declining to waive a
11 contract provision should not be sufficient wrongful conduct to
12 restart that knowledge or intent issue.

13 THE COURT: Let me stop you there for just a second.
14 I don't mean to be too particular about each element, but
15 that's a -- certainly a helpful argument about the wrongfulness
16 of the conduct, your argument that it can't be wrong to decline
17 to waive a provision of an otherwise valid contract, but it
18 gets at the third element and not so much the knowledge
19 element.

20 So is it your position that the same thing means you
21 can't have the knowledge element that's required by law or what
22 is your argument on the knowledge element?

23 MR. BERNICK: I think what Your Honor is getting at
24 is that if merely declining to waive the contract provision is
25 sufficient wrongful conduct -- and we submit it's not, but if

1 it were, then Your Honor is correct. So AEG/Coachella had
2 knowledge, according to the complaint, at the time that it
3 declined to waive a provision. That's alleged in the
4 complaint. Whether it's true or not, that's alleged.

5 So I think Your Honor is correct that this boils down
6 to this issue of what is wrongful conduct, what would
7 enforcement actually look like. And so it is a type of
8 enforcement, but if you look at the cases, the cases are about
9 threatened litigation. They're about lawsuits seeking to
10 enforce a provision. They're threatened litigation against
11 employees, threatened litigation against subsequent employers.
12 In *Arthur Andersen*, it was this extreme step of insisting on a
13 new agreement after the defendant became aware of the contract.
14 In the *Ixchel* case that we submitted to Your Honor, there was a
15 contract provision specifically targeted at the plaintiff that
16 mentioned them by name. So in that type of situation, Your
17 Honor, you can imagine knowledge and intent attaching because
18 there has been some overt act, some conduct aimed at the
19 plaintiff.

20 We don't have that here. In fact, these radius
21 clause provisions, Your Honor, are in every single artist
22 contract. This is a boilerplate contract provision, and this
23 goes to the intent issue. Coachella couldn't have specifically
24 intended harm to Soul'd Out by including a boilerplate contract
25 provision in its contracts, and it doesn't waive any of those

1 provisions. And we submit that it would be bad public policy,
2 and there's no law to support the notion that declining to
3 waive a provision could be the basis for wrongful conduct. A
4 contrary rule, the rule espoused by *Soul'd Out*, Your Honor,
5 would allow a plaintiff to just manufacture a tort claim by
6 demanding that their competitor retroactively waive a binding
7 contract provision, and we submit that can't be the law.

8 Your Honor, there's another case on point that
9 relates to this issue, and this is a case that *Soul'd Out*
10 actually cited in one of its briefs that it submitted, the
11 *Bernard v. S.B., Inc.* case. It's an Oregon Court of Appeals
12 case from 2015. And we can submit this to the Court if it
13 would be helpful.

14 But the Court there says, "As a matter of law, a
15 party invoking the express terms of a contract has a legitimate
16 purpose and does not expose itself to liability for
17 interference with economic relations."

18 And so I think this goes squarely to the wrongful
19 conduct element, the third element. But if that case is
20 true -- and we submit that it is -- then that also impacts the
21 knowledge and the intent elements of the tort as well.

22 Your Honor, we agree with respect to the third
23 element, wrongful conduct. We're not making a stand-alone
24 Article III standing argument, the argument that the Ninth
25 Circuit rejected, in fact. We submit that in our briefs, that

1 wasn't our core argument. Our argument was about the
2 substantive elements of the claim.

3 And one reason it's not wrongful conduct is the
4 reason I just described, that merely declining to waive a
5 provision can't be wrongful conduct. But there's a second
6 reason, and this has also been briefed in both our initial
7 motion to dismiss and the second motion to dismiss. Even
8 assuming merely declining to waive a contract provision could
9 be wrongful conduct, here there are arguments where as a matter
10 of law this contract provision is perfectly lawful, and there
11 are reasons both under California law and Oregon law.

12 Under California law -- and this was briefed in our
13 first motion to dismiss -- Section 16600 does not apply because
14 the contract is a personal services contract, and under
15 California law, under California Labor Code Section 2855(a),
16 and Civil Code 3423(e), defendant is allowed to specifically
17 enforce an exclusive contract for personal services of a
18 "special, unique, unusual, extraordinary, or intellectual
19 character," like contracts of performing arts.

20 And there's a case on point on this issue, Your
21 Honor, we cite in our briefs. It's the *MCA Records v. Olivia*
22 *Newton-John* case, where there the defendant -- I'm sorry, the
23 plaintiff, MCA Records, had an exclusive agreement with Olivia
24 Newton-John. Olivia Newton-John wanted to go record for
25 someone else, and MCA sued and tried to get a preliminary

1 injunction. In defending against that preliminary injunction,
2 Olivia Newton-John said, now, wait a second. Section 16600
3 bars this noncompete and invalidates it. The Court said no,
4 there's this countervailing statute in California that allows
5 for specific performance of the noncompete.

6 So, in other words, Your Honor, even if declining to
7 waive the contract provision could be unlawful conduct or
8 wrongful conduct -- and we don't agree that it is -- there's
9 this separate issue we've already raised that as a matter of
10 law, this contract could be specifically enforced, so it
11 certainly can't be wrongful conduct. And there's no
12 allegations in the complaint that could plead facts to get
13 around this statute.

14 Your Honor, then there's a second point with respect
15 to California law, and this is the supplemental authority that
16 we submitted to the Court this week. It's a late-breaking case
17 from the California Supreme Court, the *Ixchel* case from
18 August 3rd. And that case says in contracts between companies,
19 Section 16600, it doesn't apply a per se rule. It applies the
20 same exact rule of reason that Your Honor already applied to
21 Soul'd Out's claims under the Cartwright Act. You apply the
22 rule of reason, which involves antitrust injury, proving a
23 relevant market, market power, all the things that went into
24 Your Honor's analysis of the antitrust claims, and those claims
25 were dismissed with prejudice. That's the same exact analysis

1 that you should apply under Section 16600 when you're
2 evaluating claims between businesses.

3 Now, I saw in Soul'd Out's response that that assumes
4 facts not before the Court, but I've got the contracts with the
5 three artists right here in front of me. We can submit them to
6 Your Honor. Tank and the Bangas is not an individual, it's an
7 LLC, and we can share those contracts, and they're proper for
8 consideration on a motion to dismiss because the complaint
9 references those and challenges those contract provisions.

10 So because of that, the 16600 claim fails for those
11 two independent reasons. First, it's just a personal services
12 contract and we can specifically enforce it. It's far from
13 unlawful. Second of all, we have this issue under *Ixchel*,
14 which says the Court has already made this determination.
15 Soul'd Out has failed to plead a rule of reason antitrust
16 claim, and therefore the Section 16600 claim fails for exactly
17 the same reasons.

18 So we don't think that this issue of the third
19 element of wrongful conduct rises or falls just based on the
20 Ninth Circuit's ruling on standing. There's this threshold
21 issue of if declining to waive the contract provision can ever
22 be unlawful, and there's a second issue under California law,
23 the provision itself is presumptively lawful, and therefore
24 declining to waive it can't be wrongful conduct.

25 And the same thing is true in Oregon, Your Honor.

1 Under Oregon, we already know the rule of reason applies. This
2 is a common law claim and so all that same analysis applies.
3 But that same *Bernard* case that I was referencing, Your Honor,
4 that Soul'd Out cited previously, where -- where expressly
5 invoking the terms of the contract can't be the basis of the
6 claim, that case also says that when you have a provision
7 that's voidable but not actually void, it can't give rise to a
8 tort claim. The Court said, quote, the -- the plaintiff's tort
9 as claim is rejected because, quote, at most the noncompetition
10 agreement was voidable, not void, but remained valid and in
11 effect at the time that defendant invoked it.

12 Like in this case, the defendant just invoked a
13 provision. There had been no effort made under Oregon law to
14 void the contract, and therefore merely invoking it was not
15 sufficient wrongful conduct for the tort claim. This is a
16 pretty clear -- pretty clear rule.

17 And so I think there's several hurdles here, Your
18 Honor, to getting to a claim. It's not just Article III
19 standing, it's is declining to invoke a contract provision
20 sufficient wrongful conduct. But even if that were enough --
21 and we submit that it's not -- the contract provision that
22 underlies these things is presumptively lawful. Soul'd Out --
23 I'm sorry, Coachella would be entitled to an injunction to
24 enforce these provisions as a matter of law, and therefore
25 Soul'd Out can't plead that third element of its claim.

1 THE COURT: Thank you.

2 I want to walk back through this just a little bit
3 with you. So we're going to focus then on this element of
4 wrongfulness, because the other two stand or fall on the timing
5 question and perhaps, to some degree, on the wrongfulness
6 question. And I'm tentatively of a mind to say that the timing
7 question can look at the time of enforcement, not to decide
8 wrongfulness, to be sure, but just to decide the moment in time
9 in which knowledge can be evaluated. So we'll focus on the
10 wrongfulness.

11 And there are -- again, I'm looking at a limited
12 record to some degree. I want to stick with the record I have.
13 There are these four avenues of wrongfulness alleged by
14 plaintiff here. The first is, as you'll agree, gone because
15 the antitrust claim is gone and it can't be relied upon as
16 wrongfulness, and the fourth is your allegation of fraud.

17 And I guess you stand by your Footnote 10 still today
18 as your theory for why fraud just cannot be a theory of
19 wrongfulness here?

20 MR. BERNICK: We do, Your Honor. We actually thought
21 that this issue had already been dispensed with in your
22 opinion, and it wasn't appealed, and so it still stands. It's
23 not impacted by the ruling with respect to Article III
24 standing. You know, I think that our position is it can't be
25 fraud to assert that Soul'd Out is a festival when its own

1 website says it's a festival and there's a statement in open
2 court that it was a festival. How can that be fraud, intent to
3 deceive? I think that issue has been dispensed with already in
4 the case.

5 MR. ALDRICH: Your Honor, if it's helpful, I could
6 help resolve issue four.

7 THE COURT: Go ahead.

8 MR. ALDRICH: Your Honor, when we last met on this
9 case, Your Honor following the hearing allowed us to file an
10 amended complaint to elaborate further on point four, claiming
11 that what we had in the complaint at this point with respect to
12 point four was insufficient to pass a motion to dismiss stage.
13 Your Honor gave us time to further amend to address point four.
14 We notified the Court that we did not intend to take that
15 invitation and that we were going to appeal on the other three
16 points instead. So we did not appeal point -- we did not
17 address point four and we are not pursuing that.

18 THE COURT: Thank you very much.

19 So we'll stick with essentially the theory of
20 California law and the theory of Oregon law for wrongfulness.

21 And you've advanced -- I'll turn back to counsel for
22 defendant first now. So you've advanced your reasons why you
23 think these don't pass muster on a motion to dismiss on the
24 theory of wrongfulness. And I just want to be sure, setting to
25 one side your supplemental authority, you've tried to, I

1 thought, identify where you previously made these arguments
2 instead of making new arguments.

3 Is that your position?

4 MR. BERNICK: Yes, we have previously made these
5 arguments. So specifically with respect to the wrongful
6 conduct element, the most recent place we made those
7 arguments -- I'm getting some static. Hopefully you can hear
8 me.

9 The most recent point in time we made the arguments
10 was in the motion to dismiss the second amended complaint at
11 pages 31 to 32, and then the reply brief at pages 28 to 31,
12 where I made the argument that Soul'd Out could not satisfy the
13 wrongful conduct element.

14 And then with respect to the two subsidiary points I
15 made about the legality of the contract provision under
16 California and Oregon law, the argument with respect to Section
17 16600 and the personal services contract is made in the motion
18 to dismiss the first amended complaint at pages 23 to 24, and
19 the reply at page 22.

20 The argument about *Ixchel* is an argument we didn't
21 have until the Court ruled on August 3rd, and we brought it to
22 your Court's attention -- to the Court's attention earlier this
23 week.

24 With respect to the Oregon legality -- the legality
25 of the Oregon provision, we made that argument in the

1 first amended -- motion to dismiss the first amended complaint
2 at pages 25 to 27, and the reply on pages 26 to 29.

3 So we have made those arguments, Your Honor.

4 The authority that you mentioned, the *Bernard* case,
5 that came about because Soul'd Out cited it in their appellate
6 brief. And it is a helpful case on these arguments that we've
7 previously raised, and so that's why I'm raising it here.

8 THE COURT: You made the arguments, you didn't cite
9 *Bernard* previously, but you're relying on it today as a case
10 that at least isn't new to me as a cited authority but new in
11 terms of buttressing your argument to you, right?

12 MR. BERNICK: That's correct. It was a case cited in
13 Soul'd Out's appellate brief, to be clear, Your Honor. I'm not
14 sure that it had been cited in the briefs below. But it was
15 cited in the appellate brief, so it should come as no surprise
16 to plaintiff.

17 THE COURT: Thank you very much.

18 For plaintiff, your response?

19 MR. ALDRICH: Yes, Your Honor. Thank you.

20 Indeed, it seems like a lot of the arguments were
21 ones that were not in the motion to dismiss that's before the
22 Court now. Some of the arguments that were made were made in
23 the first motion to dismiss and then were abandoned by the time
24 we got to the second motion to dismiss. So it feels like I'm
25 being called upon to address arguments that are not in the

1 motion that's pending before the Court.

2 With respect to -- there's a couple key points I want
3 to raise first. If Your Honor agrees with us on the timing
4 issue, then wrongfulness is not relevant to a California claim
5 for intentional interference with the contract. There is no
6 wrongfulness element for intentional interference with a
7 contract under California law. So, in other words, if Your
8 Honor agrees with us on the timing issue, then that claim has
9 to go forward.

10 THE COURT: You're talking about --

11 MR. ALDRICH: With respect to wrongful -- Pardon?

12 THE COURT: -- Count 4?

13 MR. ALDRICH: I believe it's Count 4, yes.

14 THE COURT: All right. Thank you.

15 MR. ALDRICH: Actually, I think it's Count 5,
16 actually, but I don't have it in front of me.

17 But intentional interference with contractual
18 relations I believe is the language under California law.

19 THE COURT: All right. Thank you.

20 MR. ALDRICH: Okay. So that's the first point.

21 And so it sounds like one thing addressed here is
22 primarily issues about whether the enforcement of the
23 agreement -- of what we allege is an illegal agreement is
24 wrongful. And with respect to Oregon law, I have not heard an
25 argument yet about why the contract can be judged to be legal

1 and not wrongful under Oregon law. It is a rule of reason
2 analysis, and that rule of reason analysis or reasonability
3 analysis is subject to discovery, and the pleadings are
4 certainly sufficient to allege that what they have done is not
5 reasonable.

6 They mentioned the *Bernard* case, which was raised on
7 different points in the appellate brief but is irrelevant here
8 for purposes of wrongfulness because that concerned specific
9 language in an Oregon state statute about clauses being
10 voidable versus void. It's completely irrelevant here. We're
11 not relying on a statute. It's a statute having to do with
12 government employees, I believe. The *Bernard* argument is
13 irrelevant here.

14 And so I don't see why the case does not move forward
15 with respect to our allegation that the contract is illegal
16 under Oregon law.

17 Even under California law -- first of all, they'd
18 like to bring in new facts, but they've got a tension here now
19 in that they're arguing on the one hand that these are personal
20 services contracts but on the other hand are corporate
21 contracts. And I don't understand yet how you can have both a
22 personal services contract, which is generally specific to an
23 individual performance, and also have it be a corporate
24 contract.

25 But in any event, we addressed in our supplemental

1 authority brief --

2 THE COURT: If I can pause you there for just a
3 moment.

4 I guess I don't understand the issue, why you have a
5 hard time imagining that to be possible. Why can't, you know,
6 Olivia Newton-John be a corporation for purposes of contracting
7 and as a corporation enter into a personal services contract?
8 Why can't a lawyer LLC enter into a personal services contract?

9 MR. ALDRICH: Well, it's the type of personal
10 services contract that is referenced in that California
11 statute, or the statute that was referenced. That again is not
12 in the briefing that is subject to the motion here, but --

13 THE COURT: Well, I'm just trying to get at why you
14 think it's difficult. I can't think of a personal services
15 contract I've ever entered into with anyone that wasn't
16 actually with some sort of corporate form as opposed to just an
17 individual.

18 MR. ALDRICH: Yes, Your Honor. I would have to go
19 back and actually attempt to reconcile the law on that, but my
20 recollection is that the statute that was at issue that they're
21 referring to that provides an exception for 16600 for certain
22 types of artists might conflict with the reading that they have
23 of the *Ixchel* case. I don't think it's necessarily relevant
24 here because I believe that their argument about personal
25 services contracts isn't even in their motion to dismiss and it

1 relies on a bunch of facts that are not in the complaint that
2 they'd like to raise now.

3 But in any event -- and it also has a reference about
4 how much money people are being paid. There are no facts that
5 are in the record that would allow the Court to dismiss the
6 case on those grounds.

7 But in any event, it's not entirely relevant because
8 we have sufficiently pleaded that the contract is illegal under
9 Oregon law.

10 THE COURT: Thank you.

11 Let's turn to the unfair competition law.

12 Now, the only argument here that I really want to
13 focus on is the argument that this California statute shouldn't
14 apply in cases like ours with sort of a limited connection to
15 the state of California. And you've each cited the facts that
16 you think show or -- show the presence of or absence of some
17 connection to California.

18 Before we get to those facts, I want to hear from
19 each of you what you think the basic methodology is by which,
20 generally speaking, one evaluates whether this California
21 statute applies, if you know of one.

22 I'll start with the moving party, defendant.

23 MR. BERNICK: Thank you, Your Honor.

24 So I would admit that there's -- that the case law
25 isn't as precise on this point as we would probably like, but I

1 think it is pretty clear from the cases that we cite in our
2 papers that the statute was not enacted to protect entities
3 outside of California for harm that occurs outside of
4 California.

5 And here we have both. Those are the factors we
6 would submit the Court should evaluate. Where is the plaintiff
7 located who is trying to invoke the law? Are they a California
8 resident, a California corporation? Here that's not true.
9 Soul'd Out is an Oregon entity.

10 And separately, where is the harm experienced? And
11 the harm here is experienced in Oregon. All the harm alleged
12 is a failure to generate profits within Oregon.

13 So we would submit that those two factors are
14 important here, as we said in our brief.

15 THE COURT: So you're saying the harm alleged is the
16 failure to generate profits, but the harm actually alleged is
17 interference with business relationships and contracts. So
18 where did that alleged harm occur?

19 MR. BERNICK: So I think from our vantage point
20 what's relevant in the UCL, the UCL is protecting Californians.
21 This isn't a question of where someone happened to be sitting
22 when they signed a contract. It could have -- I actually don't
23 know. It could have been that the contract was executed in
24 California or any other state. I think the issue here is who
25 is the plaintiff and where is the harm that they're suffering.

1 I don't actually know, Your Honor, right off the top
2 of my head where the actual contract itself might have been
3 executed.

4 THE COURT: That's not my question. You say that the
5 second thing I need to look at is where did the harm occur,
6 right? And you've contended that the harm occurs in Oregon
7 because the harm that plaintiff is alleging, or at least the
8 harm I should care about is their loss of profits. But that's
9 not actually the harm plaintiff is alleging. The harm
10 plaintiff is alleging is interference with business
11 relationships.

12 So if the right question for me to ask is where did
13 the harm occur, then where did the interference with business
14 relationships occur?

15 MR. BERNICK: I think the only things that I'm aware
16 of the Court could look to are, A, where the contract was
17 entered into between Coachella and the artist or between Soul'd
18 Out and the artist; where the event would be performed, which
19 is Portland, Oregon; and where the plaintiff is located that
20 would generate the profits, and that's also in Oregon.

21 THE COURT: All right. Thank you. Thank you very
22 much.

23 For plaintiff, same question.

24 MR. ALDRICH: Yes, Your Honor. So the cases say that
25 the UCL does not apply to claims brought by nonresidents of

1 California for conduct that occurred outside of California.
2 The conduct here occurred inside of California. Defendants
3 are -- you know, they engage in their business in California.
4 The act of interfering with the contract we understand occurred
5 in California. And so this is not a case anywhere near the
6 cases that are cited by defendants in which acts that occurred
7 entirely outside of California were held not to be, you know,
8 subject to the UCL.

9 We are attempting to assert California law on
10 activities and conduct against -- and parties that engage in
11 that conduct in California.

12 THE COURT: Thank you very much.

13 Actually that question is more important to me than
14 debating with you among the various facts you've cited, but if
15 either or both of you want to say something more about the
16 facts you're relying on, as opposed to the methodology we've
17 just discussed, I don't mean to cut you off at the knees.

18 Do you have anything more you wish to add for
19 defendant on that?

20 MR. BERNICK: Your Honor, there is an additional
21 argument with respect to UCL that I want to make sure we touch
22 on, but it doesn't relate to this extra territoriality issue.
23 I just want to make sure it doesn't get lost in the shuffle.

24 THE COURT: Go ahead.

25 MR. BERNICK: So, Your Honor, the only relief

1 available under the unfair competition law is an injunction
2 under California Business and Professions Code 17203. There's
3 numerous reasons, Your Honor, why an injunction would be
4 inappropriate here. First of all, as to the three contracts at
5 issue, they expired years ago. Soul'd Out can get no relief
6 from an injunction as to those contracts. The artists are not
7 currently bound to any radius clause and Soul'd Out would be
8 free to hire them if they wanted to. So the only potential
9 injunction here would be an injunction against Coachella's just
10 standard contracts and business practices with all artists.
11 But there's no ability to bring that sort of tort claim.
12 There's no actual controversy with respect to future Coachella
13 artists who are not before the Court. There's no connection
14 between those artists and -- the hundreds of artists and the
15 handful who might consider Soul'd Out to perform. So there
16 could be no actual relationship that Coachella might be
17 interfering with, so there's no ability here to bring an
18 injunction claim either for the three at issue or for all of
19 Coachella's contracts generally, and because that's the only
20 relief available under the UCL, the claim should be dismissed
21 for that ground as well.

22 THE COURT: Thank you.

23 For plaintiff, anything further on this UCL claim?

24 MR. ALDRICH: No, Your Honor. I'll just note that
25 these are new arguments again that were not raised in the

1 briefs and, you know, we'd certainly want the opportunity to
2 respond before a claim is dismissed on grounds that are not in
3 the motion to dismiss.

4 MR. BERNICK: Your Honor, if I may. I can point you
5 to the pages where the argument is made.

6 THE COURT: Go ahead.

7 MR. BERNICK: So the argument is made with respect to
8 the injunctive relief in the motion to dismiss the second
9 amended complaint at page 33, note 26, and then also at the
10 motion to dismiss the first amended complaint at pages 22
11 through 25.

12 THE COURT: So if you had to respond to the idea that
13 no injunction ought to issue here, given that the relevant
14 contracts have all expired, what would your argument for
15 plaintiff be?

16 MR. ALDRICH: The language that is used in those
17 contracts, our understanding, is continuously used, and they
18 continue to use this language, and that language interferes
19 with our business, and therefore there is grounds to seek an
20 injunction against them continuing to put this language in
21 contracts, language that improperly impedes upon our business
22 up in Oregon, a thousand miles away from where the festival
23 takes place. So this is a situation where we have repeating
24 harm occurring. And I believe the statute allows -- the
25 California statute allows the Court to issue an injunction to

1 prevent future harm from activities that have caused harm in
2 the past.

3 Indeed, these three contracts are no longer --
4 there's no need to enjoin these three contracts because the
5 radius clause has expired, this case was filed years ago, but
6 the clause continues to be used and there's continuing harm
7 from this clause, and if it is an illegal clause under Oregon
8 or California law, this Court should enjoin Coachella from
9 using this clause, at least to the extent that it impacts
10 businesses here in Oregon.

11 MR. BERNICK: Your Honor, if I may.

12 THE COURT: Go ahead.

13 MR. BERNICK: The tension between what counsel just
14 said and the argument about wrongful conduct, I believe what he
15 just described is the mere entry into a contract is wrongful
16 conduct. And if that's true, then there can be no knowledge
17 and intent with respect to these three contracts at issue.

18 There's been no effort to -- there's no declination
19 to waive any of these provisions in other parties' contracts
20 not before the Court. There's been no effort to enforce those.
21 Those parties are not in front of the Court, Your Honor, and
22 there's binding authority on this issue that we cite in our
23 brief, the *Dowell v. Biosense* case, where the Court held that
24 it could not issue an injunction where, quote, the contract had
25 already expired by its terms and a broader injunction would,

1 quote, affect agreements with persons not before the Court and
2 whose interests are not represented in this litigation.

3 It's binding authority, Your Honor. They can't get
4 an injunction against all of Coachella's contracts, and we
5 submit that that means that the UCL claim should be dismissed.

6 THE COURT: Thank you.

7 I'll take a brief recess. If you'll remain on the
8 line, I'll be back in a few minutes to give you my ruling.

9 THE COURTROOM DEPUTY: This Court is in recess.

10 (A recess is then taken.)

11 THE COURT: Thank you all for your most helpful
12 arguments here today. I appreciate that the case has some
13 complexity in its procedural history at this point which
14 informs my ruling to some degree.

15 Let's start with the UCL. This procedural history
16 comes into play because as against the second amended
17 complaint, the argument that injunctive relief can only be
18 prospective here and isn't any longer applicable is made in the
19 reply brief, so I hadn't really heard from plaintiff earlier on
20 this subject. So that's a tough spot for plaintiff to be in.

21 There's a separate question that I'll bring up again,
22 which is to what degree I should be considering arguments made
23 against the first amended complaint that were not made against
24 the second amended complaint. And so, you know, that also
25 comes into play here.

1 On the UCL, however, it's agreed upon by the parties
2 that it's -- as most injunctions are -- prospective only, and
3 that other forms of relief aren't available under the UCL. And
4 that makes it a fairly straightforward and pretty
5 commonsensical question about whether that remedy or relief is
6 available in this case.

7 And here, in my view, the answer is that it is not.
8 It certainly isn't the sort of set of facts that would ever
9 normally give rise to injunctive relief. The theory would have
10 to be, sitting here today, that some day Soul'd Out may want to
11 enter into a performance contract with a band and successfully
12 does so, and when it does so with this as yet unknown and
13 unnamed band, that band may also possibly have entered into a
14 contract with Coachella, and that contract may also contain the
15 radius clause and the same language, and the facts may then
16 involve no waiver or other individualized facts to the case
17 that would alter the outcome. And whatever that is, that's not
18 a case or controversy such that I'm really authorized to do
19 anything about.

20 So I appreciate that plaintiff has had to respond
21 somewhat on the fly to this, and if you look at this issue for
22 plaintiff and find some case or argument that just didn't even
23 occur to you here today that's different from what we
24 discussed, then I'll allow you to raise it. But on the
25 assumption that the landscape really doesn't change much upon

1 further review for you, then the ruling is going to remain the
2 same, and I am granting the motion to dismiss the UCL claim.

3 On the interference claims, we really are in an area
4 where I'm hearing arguments on the merits really for the first
5 time in the flavor and context in which I have them here. I
6 have supplemental authority. There's nothing wrong with
7 providing supplemental authority, I appreciate it, but it is
8 brand-new. I have a citation to *Bernard* that's cited for
9 reasons never previously advanced to this Court. So the
10 existence of the case isn't new, but its point on which it's
11 being relied by defendant is brand-new.

12 And the arguments to some degree also suffer to some
13 degree from this issue of some of them raised against the first
14 amended complaint but not the second, or more fully against one
15 versus the other.

16 And then, finally, some of these arguments require, I
17 think, further factual development. That is, for example, I'm
18 unprepared to simply import wholesale antitrust analysis into
19 an analysis of contract claims here, and there's some degree to
20 which even that analysis imported would require knowing more
21 than I now know. And there are also facts that I think are
22 readily ascertainable but not on the record here in front of
23 me. The nature of the underlying contracts, for example, are
24 they personal service contracts, and were they, in fact,
25 entered into in California. Those are interesting facts I

1 don't yet know which inform the analysis to a greater or lesser
2 degree.

3 In a very -- in a simpler case with less history, I
4 might be tempted to just say, well, let's just round out the
5 briefing here more completely. And here I don't say this by
6 way of fault finding at all -- I really mean this -- but I was
7 presented with the opportunity for more briefing on the theory
8 that it would help me understand the Ninth Circuit's ruling in
9 this case. And I agreed with plaintiff that it wasn't really
10 much of a lift to understand what the Ninth Circuit said here,
11 so I didn't feel any additional briefing would be useful. I
12 might have been tempted if someone had said, we just have
13 better arguments than we've made in the past and we'd like to
14 make them, but that's not how it was presented, and I say I'd
15 be tempted because I think I probably even then would have been
16 more likely to say let's just move on to summary judgment.

17 So for the variety of reasons I've just asserted,
18 including the need for further factual development on some or
19 all of the reasons why defendant asserts these claims must
20 fall, I am denying the motion to dismiss the intentional
21 interference claims, and we'll pick these arguments up again if
22 they're appropriate at summary judgment.

23 Any questions from the moving party, from defendant
24 here on my rulings?

25 MR. BERNICK: No, Your Honor.

1 THE COURT: From plaintiff?

2 MR. ALDRICH: Your Honor, I would just request maybe
3 a couple days to review the UCL issue. I want to review the
4 statute again and review the issue with my client before Your
5 Honor enters any judgment with respect to the UCL claim. But
6 other than that, we have no further questions.

7 THE COURT: Thank you very much.

8 I assume we don't really have a schedule right now
9 moving towards summary judgment, or do we?

10 MR. ALDRICH: We don't have a schedule at all, Your
11 Honor. We don't have an answer.

12 THE COURT: Do you want to meet together and propose
13 one or try to hammer that out right now?

14 MR. BERNICK: I think, Your Honor, from defendants'
15 perspective, it would be a good idea for us to connect first
16 and see if we can come to an agreement, if that's okay with
17 Your Honor.

18 THE COURT: I prefer that, since it allows you to
19 really build into your own schedules in an informal way the
20 turning points that you need to decide.

21 So you'll have plenty of time for plaintiff to take a
22 look at the UCL, and then I'll ask you, let's say within two
23 weeks, can you all submit a proposed case management schedule
24 that can be joint or it can be joint in part and outline your
25 areas of disagreements.

1 Will two weeks work for plaintiff?

2 MR. ALDRICH: Yes. Two weeks works, Your Honor. We
3 would request that an answer be forthcoming sooner, pursuant to
4 the rules, but with respect to a case schedule going forward,
5 two weeks to work with counsel and come up with an agreement is
6 just fine.

7 THE COURT: For defense, can you come up with a
8 schedule in two weeks?

9 MR. BERNICK: Absolutely, Your Honor.

10 THE COURT: How about an answer? What's your plan?

11 MR. BERNICK: I would need to connect with my client
12 on that. As you might suspect, with remote working conditions
13 and everything else in the concert industry, I just wouldn't be
14 able to commit today to a timeline, but perhaps that could be
15 the first thing that I meet and confer with counsel for
16 plaintiffs this week, to come up with a timeline.

17 THE COURT: Very well. Thank you.

18 Thank you all. We'll be in recess.

19 MR. ALDRICH: Thank you, Your Honor.

20 THE COURTROOM DEPUTY: This court is adjourned.

21 (Proceedings concluded at 12:07 p.m.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

September 2, 2020

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

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